Supreme Court, U.S.
FILED
AUG 14 1980
MICHAEL RODAK, JR., CLERK

NO. 80-252

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

* * *

TEXAS A & M
UNIVERSITY, ET AL.,
Petitioners

V.

GAY STUDENT SERVICES, ET AL.,
Respondents

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

1. Whether Texas A & M University, established by the Constitution and statutes of Texas, is a person for purposes of applying 42 U.S.C. §1983.

2. If a state educational institution is a person, whether the Eleventh Amendment to the United States Constitution applies so as to bar jurisdiction over Texas A & M University in a federal district court.

PARTIES TO THE PROCEEDING

Gay Student Services, an organization composed of students of Texas A & M University, and three of its members - J.M. Minton, Keith Stewart and Partricia Woodridge - as Plaintiffs filed this cause against Texas A & M University and the following persons in their official capacity:

Jack K. Williams, President of Texas A & M University,

John J. Koldus, Vice-President for Student Services of Texas A & M University,

W. C. Freeman, Executive Vice-President for Administration of Texas A & M University.

Also sued as Defendants in their official capacity were the following members of the Board of Regents of Texas A & M University:

Clyde H. Wells,
Richard Goodson,
H.C. Bell, Jr.,
John Blocker
John Coleman,
Alfred I. Davies,
Joe Reynolds,
Wilma Smith,
Ross Watkins.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

Petitioners, Texas A & M University, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on February 20, 1980, with Petitioners' timely Motion for Rehearing denied on May 16, 1980.

OPINION BELOW

The opinion of the Court of Appeals is reported in 612 F.2d 160. The opinion, along with the order overruling the Petitioner's Motion for Rehearing and the Judgment of the Fifth Circuit, is set out in the appendix (the denial of rehearing is reported at 620 F.2d 300). The dismissal order by the District Court and its Final Judgment are also set out in the attached appendix.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was entered on February 20, 1980. A timely Petition for Rehearing with a suggestion that the rehearing be en banc was denied on May 16, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

AUTHORITIES INVOLVED

The statute in question in this case is 42 U.S.C. §1983, which reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Also at question in this case is the Eleventh Amendment of the United States Constitution, which reads as follows:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

STATEMENT OF THE CASE

Gay Student Services, an association of students attending Texas A & M University, sought and was denied official recognition as an on-campus student organization by the University.

Respondents, Plaintiffs in the District Court below, filed suit in the United States District Court against Petitioners, alleging, inter alia, a violation of their First Amendment right to free association and praying for both declaratory and injunctive relief plus monetary damages, costs and attorneys fees.

Petitioners timely filed an answer, and some two months later also filed a Motion to Dismiss. When the Respondents failed to respond to Petitioners' Motion to Dismiss within the required time limit, the District Court entered an Order and Final Judgment dismissing the Petitioners' cause of action.

The United States Court of Appeals for the Fifth Circuit, in its opinion of February 20, 1980, vacated the District Court's dismissal. Since the District Court's Order did not specify a legal theory for its basis, the Court of Appeals reviewed each of the grounds which had been asserted by Petitioners in their Motion to Dismiss -- that defendants were not "persons" for the purposes of 42 U.S.C. §1983, that Plaintiffs had not stated a cause of action giving rise to general federal question jurisdiction under 28 U.S.C. §1331, that Eleventh Amendment immunity was a jurisdictional bar to the maintenance of the suit, that Plaintiffs lacked standing, and that dismissal of the cause as pleaded under 28 U.S.C. §§2201 and 2202 was proper. Upon finding that dismissal could not have properly been predicated on any of the asserted grounds, the Court of Appeals vacated the Order and remanded the case to the District Court.

Petitioners then filed a Petition for Rehearing, with the suggestion that the rehearing be en banc, in the Court of Appeals; the petition was overruled on May 16, 1980.

Petitioners now file this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

The opinion of the Fifth Circuit Court of Appeals, citing as its authority *Monell vs. Department of Social Services of City of New York*, 436 U.S. 658 (1978), held that a state-owned and operated university is a "person" for the purposes of applying 42 U.S.C. §1983. This opinion is in conflict with a decision from the Third Circuit, in which that Court held that *Monell vs. Department of Social Services of City of New York, supra*, did not mandate a holding that a similar state-owned and operated university was such a "person". *Skehan vs. Board of Trustees of Bloomsburg State College*, 590 F.2d 470 (3rd Cir. 1978).

The decision of the Fifth Circuit Court of Appeals found "no analytical difference in the operation of universities and other government bodies such as cities", and further found that Petitioners no longer possessed absolute §1983 immunity. *Gay Student Services vs. Texas A & M University, supra*, at 163. Texas A & M University is a land grant college provided for by Tex.Const. art. VII, §13 and the statutes of the State of Texas. The University receives funds appropriated by the Texas Legislature and has no existence independent of the State. A finding that such an entity is a "person" leaves little room for a finding that any other agencies of the State of Texas would not also be "persons", since almost all agencies are governed by a board such as that governing Petitioner University. Thus, the Court of Appeals for the Fifth Circuit, with its sole authority the decision of this Court in *Monell*, has found an agency of the State of Texas to be a "person" under 42 U.S.C. §1983, even though that question was specifically reserved by the Court's opinion, which states:

"Our holding today, is, of course, limited to local

> government units which are not considered part of the State for Eleventh Amendment purposes."

Monell vs. Department of Social Services of the City of New York, supra, at 690 n. 54.

This Court should grant certiorari in this cause and determine the question of whether States are persons for the guidance of the courts and the litigants.

II.

Moreover, this Court should determine the relationship that the Eleventh Amendment to the United States Constitution bears to the application of 42 U.S.C. §1983 to the States. By its holding, the Court of Appeals has not only decided the issue left open by this Court in *Monell*, but has reached a decision which apparently conflicts with the holdings of this Court in *Quern vs. Jordan*, 440 U.S. 332 (1979) and *Alabama vs. Pugh*, 438 U.S. 781 (1978) with respect to the application of the Eleventh Amendment. Those cases clearly held that 42 U.S.C. §1983 did not abrogate the traditional immunity enjoyed by the States, thus seeming to indicate either that States are not persons for the purposes of the statute or that the finding of Eleventh Amendment immunity obviates the necesity of deciding the "person" issue.

Edelman vs. Jordan, 415 U.S. 651 (1974), indicates that a federal court's remedial power under 42 U.S.C. §1983 is limited by the Eleventh Amendment absent express congressional authorization to sue the States. It further holds that no such authorization is present nor can authorization be inferred merely because a suit under §1983 can be maintained against officers of the State.

The Fifth Circuit's opinion referenced the dilemma when it states that "if plaintiffs were seeking only

monetary recovery from the defendants, we would first examine the nature of the entity sued" to determine its relationship to the State, but then found such determination unnecessary since the plaintiffs were also seeking declaratory and injunctive relief. *Gay Student Services vs. Texas A & M University, supra*, at 164.

This Court, however, has clearly held that the nature of the relief sought against an arm of the State or against the State itself is not a factor for Eleventh Amendment purposes. Finding the interest of the State in preserving its immunity as regards both injunctive and declaratory relief to be more than merely acdemic, this Court held that such injunctive or other relief against the State or an arm of the State violated that State's right to assert its sovereign immunity. *Alabama v. Pugh, supra*, at 782.

Therefore, this Court should grant certiorari in this cause to determine the proper relationship between the application of 42 U.S.C. §1983 to the States and the right of those States to assert their immunity.

CONCLUSION

The Petition for Writ of Certiorari should be granted, and this Court should determine whether the states and their agencies are persons within the ambit of 42 U.S.C. §1983.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, _____, Assistant Attorney General of Texas, do hereby certify that three true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been served upon attorney for Respondent by placing same in the United States mail, certified, return receipt requested, addressed to Mr. J. Patrick Wiseman, 3303 Main Street, Suite 300, Houston, Texas 77002 on this the _____ day of August, 1980.

_____

APPENDIX

GAY STUDENT SERVICES et al.,
Plaintiffs-Appellants,

v.

TEXAS A & M UNIVERSITY et al.,
Defendants-Appellees.

No. 77-3395.

United States Court of Appeals,
Fifth Circuit.

Feb. 20, 1980.

Students belonging to homosexual organization which had been denied official registration as student organization brought action against the college. The United States District Court for the Southern District of Texas, Ross N. Sterling, J., dismissed and students appealed. The Court of Appeals, Coleman, Chief Judge, held that: (1) university was a person for purposes of federal civil rights statute; (2) Eleventh Amendment did not bar claim for injunctive and declaratory relief; (3) students had standing; and (4) court had civil rights jurisdiction over the claim.

Vacated and remanded.

Appeal from the United States District Court for the Southern District of Texas.

Before COLEMAN, Chief Judge, FRANK M. JOHNSON, Jr., and POLITZ, Circuit Judges.

COLEMAN, Chief Judge.

The plaintiffs-appellants are student members of Gay Student Services, a voluntary association which has sought and been denied official registration as a student

organization by Texas A & M University at College Station.[1]

The complaint alleged that on April 4, 1976, representatives of Gay Student Services met with Dr. John Koldus and requested certain privileges for their organization, including access to bulletin boards and facilities for special events. This request was refused and the students informed Dr. Koldus that they would request *formal recognition* of Gay Student Services. Dr. Koldus told the students to submit their formal application to Dr. Adair, Director of Student Activities; he then would suspend the regular procedure of appealing to the Student Organization Board and would personally render a decision on the application.

Application for recognition was submitted April 5, 1976. On May 4, 1976, representatives of Gay Student Services met again with Dr. Koldus, who reported that he had written a response to the application but had been asked by University officials to delay its release until the President and University legal staff had an opportunity to study the request. Koldus also told the student representatives that he had ordered the "Batallion," the student newspaper, not to print stories about Gay Student Services but that he was changing this order so that news articles could be printed.

On November 29, 1976, Dr. Koldus wrote a letter denying official recognition to the group. In this letter he noted that homosexual conduct was illegal in Texas

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[1]Listed as defendants are Texas A & M University, Jack K. Williams, President of Texas A & M at College Station, John J. Kholdus, Vice-President for Student Services at Texas A & M at College Station, and W. C. Freeman, Executive Vice-President for Administration at Texas A & M at College Station. Also named as defendants are the members of the Board of Regents for Texas A & M. All defendants are sued in their *official* capacities and not individually.

[as it undoubtedly is under Chapter 21 of the Texas Criminal Code] and that Gay Student Services was likely to promote and incite acts contrary to and in violation of the Texas Penal Code. He concluded that Gay Student Services was not "consistent with the philosophy and goals that have been developed for the creation and existence of Texas A & M University."

The complaint further alleges that due to the denial of official recognition the group has been forced to secure off-campus meeting places, involving rent and maintenance costs; meetings have often been in private homes, limiting the number who can attend; hostility of other students toward the organization has increased; members of the organization have been restricted in their ability to speak to classes and seminars; advertising and distribution of literature informing students of meetings, services, and educational goals of the organization has been severly limted; and "traiditional myths" about sexual stereotypes have been reinforced. The plaintiffs further state that Texas A & M University has at no time prohibited the enrollment of men and women who openly identify themselves as homosexuals. Nevertheless, it refuses these students the same rights as other students to organize and meet for the purpose of discussing common interests and problems.

The relief sought by plaintiffs included (1) an injunction permanently enjoining the defendants from continuing to enforce their policy in refusing to recognize Gay Student Services, (2) a declaratory judgment declaring the policy of the defendants unconstitutional on its face, (3) damages for the deprivation of their rights to express their views and assemble together, and (4) costs, including reasonable attorneys fees.

The defendants answered, admitting only that Gay Student Services had applied for official University recognition and had been denied.

On June 28, 1977, the defendants filed a motion to dismiss. it was alleged that (1) Texas A & M University and the other named individual defendants, sued in their official capacity, were not "persons" for the purposes of 42 U.S.C. §1983; therefore, jurisdiction was lacking under 28 U.S.C. §1343, (2) plaintiffs had not stated a cause of action giving rise to general federal question jurisdiction under 28 U.S.C. § 1331. (3) plaintiffs had not overcome the jurisdictional bar of the 11th Amendment, (4) plaintiffs did not have standing to assert the cause they sought to bring, and that (5) dismissal of the cause as pleaded under §§ 2201 and 2202 was proper.

On November 2, 1977, the District Court entered an order granting defendants' motion to dismiss, commenting only that the motion appeared to be "meritorious and unopposed." No specific ground for the action was stated.

Since the dismissal order does not tell us the legal theory upon which the dismissal was based, we proceed to a consideration of all the grounds asserted in the motion to determine whether at this juncture dismissal could have properly been predicated on any one of them.[2]

The result is that the dismissal must be vacated and the case remanded for further proceedings not inconsistent herewith.

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[2]The motion to dismiss did not state that it was premised upon a failure to state a claim upon which relief can be granted. F.R.Civ.P. 12(b)(6). We note that such a claim would fail, nevertheless, under the standard set out in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), that such a motion should not be granted unless it appears to a certainty that the plaintiff would not be entitled to recover under any statement of facts which could be proved in support of his claim. *See Reeves v. City of Jackson*, 532 F.2d 491 (5th Cir. 1976); *Cook & Nichol, Inc. v. Plimsoll Club*, 451 F.2d 505 (5th Cir. 1971).

I

Asserted Ground No. 1: § 1983 "person" status

At the time this suit was dismissed by the District Court the Supreme Court decision in *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), had not been handed down. Prior to *Monell*, suits against cities and similar local governmental agencies had been barred under 42 U.S.C. § 1983 because such entities were not "persons" within the meaning of the statute, *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973); *Moor v. County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973); *Monroe Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

Monell held:

> Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.

436 U.S. at 690, 98 S.Ct. at 2035-36.

Consequently, an institution of higher learning, such as the university here involved, no longer enjoys absolute § 1983 immunity.[3] *Monell* did not specifically

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[3]The *Monell* majority opinion also stated in a footnote: "Our holding today is, of course, limited to local government units which are not considered part of the State for Eleventh Amendment purposes." 436 U.S. at 690 n. 54, 98 S.Ct. at 2035-36 n. 54. An entity may be a "person" under § 1983 yet still not be sued for monetary relief due to eleventh Amendment immunity based upon the

mention universities as "persons" but there would appear to be no analytical difference in the operation of universities and other governing bodies such as cities. *See Goss v. San Jacinto Junior College*, 588 F.2d 96 (5th Cir. 1979), holding San Jacinto Junior College to be a "person" for purposes of § 1983.

Of course, for a university to be suable under § 1983, the injury must be due to an official policy or custom. The *Monell* Court stated:

> On the other hand, the language of §1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor--or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory. 436 U.S. at 691, 98 S.Ct. at 2036.
>
> * * * * *
>
> We conclude, therefore, that a local government may not be sued under §1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official

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entity's close connection with the State and its treasury. This does not, however, prevent declaratory or injunctive relief. The word "person" as used in § 1983 is not intended to have a bifurcated application dependent on the nature of the relief sought. *City of Kenosha v. Bruno*, 412 U.S. 507, 513, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973).

> policy, inflicts the injury that the government as an entity is responsible under § 1983. 436 U.S. at 694, 98 S.Ct. at 2038.

The undisputed allegations of the complaint makes it clear that the defendant University, officials in this case were, with authority, promulgating and enforcing the official policy of the University as to the controversy in issue.

This "person" status applies to University officials when sued in their official capacity. As *Monell* stated in a footnote:

> Since official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent--at least where Eleventh Amendment considerations do not control analysis--our holding today that local governments can be sued under § 1983 necessarily decides that local government officials sued in their official capacities are "persons" under § 1983 in those cases in which, as here, a local government would be suable in its own name.

436 U.S. at 690 n. 55, 98 S.Ct. at 2036-55. *See Rainer v. Jackson State College*, 591 F.2d 1002 (5th Cir. 1979); *Harkless v. Sweeny Independent School District of Sweeny, Texas*, 554 F.2d 1353 (5th Cir.), *cert. denied*, 434 U.S. 966, 98 S.Ct. 507, 54 L.Ed.2d 452 (1977).[4]

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[4]After *Monell* was handed down, a number of district court cases holding cities and other various local governing bodies as not "persons" were vacated and remanded for application of *Monell*. *See, e.g., McKnight v. Southeastern Pennsylvania Transportation Authority*, 583 F.2d 1229 (3rd Cir. 1978)(vacating a district court decision relying on pre-*Monell* law in holding the state governmental entity SEPTA not a "person" under § 1983); *Kurek v. Pleasure Driveway and Park District of Peoria, Illinois*, 583 F.2d 378 (7th Cir. 1978)(remanding civil rights action against Park District in light of *Monell* establishing governmental units as "persons").

II

Asserted Ground No. 2: 11th Amendment Immunity

If the plaintiffs were seeking only monetary recovery from the defendants, we would first examine the nature of the entity sued to determine whether it is an arm of the state or an independent "political subdivision". *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). *See Goss v. San Jacinto Junior College, supra* at 98. If Texas A & M University is an arm of the state such that any recovery of damages would, in effect, be against the state, to come from the state treasury, then the Eleventh Amendment would bar the action and recovery.[5] If the

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For Fifth Circuit cases vacated and remanded in light of *Monell*, *see, e.g., Thurston v. Dekle*, 531 F.2d 1264 (5th Cir. 1976)(holding city was not suable under § 1983 as a "person" but individual members of municipal agencies were suable in their official capacities', *vacated*, 438 U.S. 901, 98 S.Ct. 3118, 57 L.Ed.2d 1144, *on remand*, 578 F.2d 1167 (5th Cir. 1978)(vacating and remanding to the district court); *Marquiz v. City of San Antonio*, 528 F.2d 499 (5th Cir. 1976)(en banc)(holding that neither the city nor the Board of Trustees of the policeman and fireman pension fund was a § 1983 "person"), *vacated*, 438 U.S. 901, 98 S.Ct. 3117, 57 L.Ed.2d 1144, *on remand*, 586 F.2d 529 (5th Cir. 1978)(city and board held to be "persons" amenable to suit under § 1983).

[5]Numerous circuit decisions have found universities to be so closely connected with the state that a suit against the university or its officials is the same as a suit against the state. *E.G., Jagnandan v. Giles*, 538 F.2d 1166 (5th Cir. 1976)(officials and members of Board of Trustees of Mississippi State University held immune from suit to recover excess payments of tuition by resident alien students); *Prebble v. Brodrick*, 535 F.2d 605 (10th Cir. 1976)(suit against members of Board of Trustees of the University of Wyoming barred); *Long v. Richardson*, 525 F.2d 74 (6th Cir. 1975)(Memphis State University officials immune); *Thonen v. Jenkins*, 517 F.2d 3 (4th Cir. 1975)(East Carolina University officials immune); *Brennan v. University of Kansas*, 451 F.2d 1287 (10th Cir. 1971)(University of Kansas and University Press of Kansas immune as alter egos of the state); *Walstad v. University of Minnesota Hosps.*, 442 F.2d 634 (8th Cir. 1971).

University is an independent political body or has in some manner waived its immunity, however, monetary recovery would not impinge on the Eleventh Amendment.[6]

We need not now decide this issue because the plaintiffs seek injunctive and declaratory relief as well as monetary relief. Indeed, the main thrust of plaintiffs' suit is for injunctive relief ordering the University and

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While we make no determination here concerning the relationship of Texas A & M University to the state of Texas for Eleventh Amendment immunity purposes, we do note that at least one other Texas University with its governing board and officials has been held immune from monetary damages or relief based on the Eleventh Amendment. *Ramos v. Texas Tech University*, 441 F.Supp. 1050 (N.D.Tex. 1977), *affirmed on basis of opinion below*, 566 F.2d 573 (5th Cir. 1978)(per curiam). *See Henry v. Texas Tech University*, 466 F.Supp. 141 (N.D.Tex. 1979)(explaining in more detail the status of Texas Tech University as an arm of the state and thus immune under the Eleventh Amendment).

[6]Institutions of higher learning that are not so closely connected with the state as to be an instrumentality of the state but rather display the characteristics of an independent body are not immune from suit for monetary relief. *See, e.g., Goss v. San Jacinto Junior College*, 588 F.2d 96 (5th Cir. 1979), *citing Hander v. San Jacinto Junior College*, 519 F.2d 273, *aff'd per curiam on rehearing*, 522 F.2d 204 (5th Cir. 1975)(under Texas Code suit against the junior college was not in reality a suit against the state); *Samuel v. University of Pittsburgh*, 538 F.2d 991 (3rd Cir. 1976)(University of Pittsburgh, Temple University and Penn State University held liable for equitable restitution of tuition fees because of not being state instrumentalities).

Waiver of immunity may occur under state statute or school charter. *See, e.g., Hostrop v. Board of Junior College District No. 515*, 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963, 96 S.Ct. 1748, 48 L.Ed.2d 208 (school board permitted to be sued "in all courts" under a state code provision held to waive immunity); *Soni v. Board of Trustees of University of Tennessee*, 513 F.2d 347 (6th Cir. 1975), *cert. denied*, 426 U.S. 919, 96 S.Ct. 2623, 49 L.Ed.2d 372 (1976)(suit permitted due to waiver explicit in University's charter allowing suit "in any court of law or equity").

its officials to grant recognition to plaintiffs' organization. Under *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) and *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), prospective injunctive relief is clearly allowed against state officials in their official capacities. Dismissal of plaintiffs' claim based upon Eleventh Amendment immunity, therefore, was improper in light of the injunctive relief south. *See Jagnandan v. Giles*, 538 F.2d 1166 (5th Cir. 1976) (injunctive relief granted in § 1983 suit declaring state statute unconstitutional but damages denied because of immunity); *Hander v. San Jacinto Junior College*, 519 F.2d 273, *aff'd per curiam on rehearing*, 522 F.2d 204 (5th Cir. 1975) (injunction granted in § 1983 suit for reinstatement of faculty member).

III

Asserted Ground No. 3: Standing

The assertion that plaintiffs lack standing to bring the suit is *frivolous.*

IV

Asserted Ground No. 4: § 1331 jurisdiction and cause of action

A fourth ground asserted for dismissal of the present action is that plaintiffs fail to state a cause of action for general federal question jurisdiction under 28 U.S.C. § 1331. This is wholly immaterial because jurisdiction has been properly established under 28 U.S.C. § 1343 for a § 1983 cause of action.

Declaratory Judgment

Since jurisdiction has been established at least under § 1343 and § 1983, the separate remedy available through declaratory judgment may also proceed. *Red Lobster Inns of America, Inc. v. New England Oyster House, Inc.*, 524 F.2d 968 (5th Cir. 1975).

CONCLUSION

In view of the foregoing considerations we conclude that the District Court should not have dismissed the complaint on any of the grounds asserted in the motion for dismissal.

In remanding the case for disposition on the merits we intimate no opinion as to how the case should be decided once the relevant facts have been fully developed.

The standards applicable to the disposition of a case of the kind presently before us have never been *specifically* illuminated by the Supreme Court. *See Ratchford v. Gay Lib* (dissent to the denial of certiorari), 434 U.S. 1080, 98 S.Ct. 1276, 55 L.Ed.2d 789 (1978). Some of the cases dealing with First Amendment rights of college student associations are footnoted below.[7]

VACATED and REMANDED for further proceedings not inconsistent herewith.

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[7] *Healy v. James*, 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972); *Papish v. University of Missouri Curators*, 410 U.S. 667, 93 S.Ct. 1197, 35 L.Ed.2d 618 (1973). In *Healy* it was held that the student organization in question was entitled to recognition under the First Amendment unless there was a showing that the group directly advocated inciting or producing imminent lawless action likely to cause such a result. *Healy* also cited *Tinker v. Des moines Independent School District*, 393 U.S. 503 at 513, 89 S.Ct. 733, 21 L.Ed.2d 731, for the principle that the power to prohibit "lawless action" is not limited to acts of a criminal nature but may reach actions which "materially and substantially disrupt the work and discipline of the school", etc., 408 U.S. 189, 92 S.Ct. at 2350.

See, also Gay Students Organization of the University of New Hampshire v. Bonner, 509 F.2d 652 (1st Cir. 1974); *Gay Alliance of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976); and *Gay Lib v. University of Missouri, supra*, 558 F.2d 848 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080, 98 S.Ct. 1276, 55 L.Ed.2d 789 (1978); *M. C. L. U. v. University of Southern Mississippi*, 452 F.2d 564 (5th Cir. 1971); *Hudson v. Harris*, 478 F.2d 244 (10th Cir. 1973); *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982, 97 S.Ct. 1678, 52 L.Ed.2d 377 (1977).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GAY STUDENT SERVICES, ET AL	§	
	§	
v.	§	CIVIL ACTION NO. H-77-325
	§	
TEXAS A & M UNIVERSITY, ET AL	§	

ORDER

The Court having considered the motions to dismiss by defendants and it appearing to the Court that such motions are meritorious and unopposed, it is hereby

ORDERED that this case be dismissed.

DONE at Houston, Texas, this *2nd* day of November, 1977.

/s/

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GAY STUDENT SERVICES, ET AL	§	
v.	§	Civil Action No. H-77-325
TEXAS A & M UNIVERSITY, ET AL	§	

FINAL JUDGMENT

From a consideration of the pleadings submitted in this cause, it is the opinion of this Court that this action should be and hereby is dismissed.

This is a FINAL JUDGMENT.

DONE at Houston, Texas, this *2nd* day of November, 1977.

/s/

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * *

October Term, 19

* * *

No. 77-3395

* * *

D.C. Docket No. CA-77-H-325

GAY STUDENT SERVICES, ET AL.,
Plaintiffs-Appellants,

versus

TEXAS A & M UNIVERSITY ET AL.,
Defendants-Appellees.

Appeal From the United States District Court for the Southern District of Texas

Before COLEMAN, Chief Judge, FRANK M. JOHNSON, Jr., and POLITZ, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, vacated; and that this cause be, and the same is hereby, remanded for further proceedings to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that the defendants-

appellees pay to the plaintiffs-appellants the costs on appeal, to be taxed by the Clerk of this Court.

February 20, 1980

ISSUED AS MANDATE: MAY 23, 1980

United States Court of Appeals
FIFTH CIRCUIT
Office of the Clerk

May 16, 1980

TO ALL PARTIES LISTED BELOW:

NO. 77-3395 - GAY STUDENTS SERVICES, ET AL. v. TEXAS A & M UNIVERSITY, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

/s/

By _____
Deputy Clerk

cc: Mr. J. Patrick Wiseman
Mr. Larry Sauer
Ms. Sarah Scott
Mr. Robert G. Turner
Mr. Donald C. Knutson
Mr. Thomas F. Coleman
Mr. Lonny Zwiener
Mr. Nathan Johnson

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO. 80-252

TEXAS A&M UNIVERSITY, ET AL
Petitioners

v.

GAY STUDENT SERVICES, ET AL,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO. 80-252

TEXAS A&M UNIVERSITY, ET AL,
Petitioners

v.

GAY STUDENT SERVICES, ET AL,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

The Respondents, GAY STUDENT SERVICES, et al., respectfully request that this Court deny the petition for writ of certiorari invoked pursuant to 28 U.S.C. § 1254 (1), seeking review of the Fifth Circuit's Opinion in this case. That Opinion, styled *Gay Student Services, et al. v. Texas A&M University, et al,* No. 77-3395 and decided on February 20, 1980, is reported at 612 F.2d 160.

REASONS WHY WRIT SHOULD BE DENIED

I.

NO CONFLICT EXISTS

The conflict asserted by the Petitioners between the instant cause and *Skehan v. Board of Trustees of Bloomsburg State College*, 590 F.2d 470 (3rd Cir. 1978), *cert. denied* ____U.S.____, 100 S.Ct. 61 (1979) is illusory. It is true that the decision of the Fifth Circuit Court of Appeals in the cause *sub judice* held that:

> [A]n institution of higher learning, such as the university here involved, no longer enjoys absolute Section 1983 immunity (footnote omitted). *Monell* [*v. Dept. of Soc. Serv. of City of New York*, 436 U.S. 658 (1978)] did not specifically mention universities as "persons" but there would appear to be no analytical difference in the operation of universities and other governing bodies such as cities.

Gay Student Services, 612 F.2d at 163-4. Further, the Circuit Court made clear that this holding was premised upon the rationale that the "person" requirement of 42 U.S.C. § 1983[1] "is not intended to have a bifurcated application dependent on the nature of the relief sought." *Gay Student Services*, 612 F.2d at 164 n.3. But in so holding, the Circuit Court expressly denied abbreviating whatever Eleventh Amendment immunities are available to these Petitioners. *Gay Student Services*, 612 F.2d at 164-5. Due to the posture of the case[2] a finding that Texas A&M Uni-

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1. Each Constitutional provision and statutory enactment referred to is set out in an Appendix attached hereto.

2. This cause reached the circuit shortly after its origination prior to any development of the facts. Plaintiffs filed their Original Complaint on February 28, 1977. On June 28, 1977, the Defendants

versity was or was not an alter ego to the State was pretermitted.[3] *Gay Student Services,* 612 F.2d at 165. In disassociating the Eleventh Amendment issue the Circuit Court held that:

> If Texas A&M University is an arm of the State such that any recovery of damages would, in effect be against the State, to come from the State Treasury, then the Eleventh Amendment would bar the action and recovery.

Gay Student Services, 612 F.2d at 165.

Skehan, supra, is easily reconciled with this holding. *Skehan's* essential finding was that:

> [A]bsent a much clearer statement by the Supreme Court [than found in *Monell, supra*] to the effect that Section 1983 must now be construed as waiving the state's sovereign immunity *from awards of monetary damages,* this Court considers itself bound by the holding of *Edelman* [*v. Jordan,* 415 U.S. 651 (1974)] to the contrary. (emphasis supplied.)

Skehan, supra at 490. Thus, it is apparent that the holdings in *Gay Student Services* and *Skehan* do not engage the issues suggested in Petitioner's application for certiorari. It follows that the claimed conflict does not exist. As such, the petition should be denied and resolution of this matter await a more appropriate day after the various

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filed a Motion to Dismiss which was granted on November 2, 1977. Thereafter the cause proceeded to the circuit on appeal. *See Gay Student Services, supra* at 163.

3. Petitioners suggest that there exists a judicial determination that Texas A&M University is "state-owned and operated". Petition for Writ of Certiorari at p. 4. As will be discussed more fully *infra,* no determination has as yet been made concerning the University's position vis-a-vis the State of Texas.

lower federal forums have had the opportunty to elucidate the legal precepts involved.

II.

SOVEREIGN IMMUNITY NOT DETERMINED

Nor does the cause *sub judice* provide an adequate foundation for the requested plenary review of the relationship between the Eleventh Amendment to the United States Constitution and 42 U.S.C. § 1983.

(A) Texas A&M University May Not be an Alter Ego of the State.

As noted in the Opinion below, there is as yet no evidence establishing the nature of Texas A&M University's agency relationship with the state. *Gay Student Services*, 612 F.2d at 165 n.6. There is little rationale in this Court's undertaking to rule upon whether a state agency is immune from suit when the record does not disclose that we deal with an agency that would be entitled to such immunity. *See Unified Sch. Dist. No. 480 v. Epperson*, 551 F.2d 254 (10th Cir. 1977), vacated and remanded on other grounds 435 U.S. 948 (1978) point reiterated on remand 583 F.2d 1118 (1978). To do so would be to render a mere advisory opinion or to undertake the fact finding functions dedicated, in the first instance, to the District Court.

(B) The Right to State Sponsored Immunity From Injunctive Relief is Not Presented.

A state agency (presupposing that Texas A&M University is such an agency) does not stand foursquare with the state itself for purposes of the Eleventh Amendment.

Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, ____U.S.____, 99 S.Ct. 1171 (1979); *Hopkins v. Clemson Agricultural College of South Carolina*, 221 U.S. 636 (1911). The Constitution establishes a system of confederated states. The workings of this system, in its complexity, have been referred to as "our federalism". *See, e.g., National League of Cities v. Usery*, 426 U.S. 833 (1976); and *Younger v. Harris*, 401 U.S. 37 (1971). In this configuration the national government should and must show due deference to the individual states. *Younger, supra.* Traditionally, one demonstrable attribute of perfecting that deference has been the adherence to the immunity of the states to prosecution in federal courts without consent.

> Because of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other, a restriction upon the exercise of the federal judicial powers has long been considered to be appropriate in a case such as this.

Employees of Dept. of Public Health and Welfare v. Dept. of Public Health and Welfare, 411 U.S. 279, 294 (1973) (Marshall, with Stewart, concurring).

Recognizing the impact of the Fourteenth Amendment this Court has substantially limited that immunity. *See Ex Parte Young*, 209 U.S. 123 (1908); *Malone v. Bondain*, 369 U.S. 643 (1962); *Dµgan v. Rank*, 372 U.S. 609 (1963); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Hutto v. Finney*, 437 U.S. 678 (1978); *and City of Rome v. United States*, ____U.S.____, 100 S.Ct. 1548 (1980). Even *Edelman*, 415 U.S. at 664, recognizes that a prevailing plaintiff is entitled to prospective relief from the State. *See also Milliken v. Bradley*, 433 U.S. 267, 290 (1977).

Thus it follows that the traditional precepts to be preserved by immunity are not nearly as pervasively involved when a mere state agency (as opposed to the state itself) is sought as a defendant. It might well be that upon a full evidentiary consideration of this cause, the District Court would determine that there is little analytical difference from enjoining a state officer, in his official capacity, and enjoining this state agency. In neither case is the state an actual party. Rather, only its agents, corporate or personal, are involved. Nonetheless, this is obviously an issue that need not be addressed until after the factual determination of whether or not Texas A&M is a state university has been made.

Consequently, its resolution is inextricably bound up with the factual setting yet undeveloped on this record. It evades logic and the efficient use of limited judicial resources to reach the issue of a state agency's Eleventh Amendment immunity without having first fully explored the relevant precursors.

(C) Waiver of Immunity Unexplored.

Finally, this Court has found states to have waived their rights to sovereign immunity and/or consented to suit in the federal courts. *See, e.g., Parden v. Terminal R. of Alabama State Docks Dept.,* 377 U.S. 184 (1964); *and Curran v. Arkansas,* 15 How. 304 (1853). The court below specifically referenced the waiver issue and left this matter open for resolution by the District Court. *See Gay Student Services,* 612 F.2d at 165 and n.6. It may be that Texas A&M University has generally consented to process and suit within the federal courts [*Parden, supra*] or has specifically waived these defenses in order to receive federal funding or to engage in interstate com-

merce of one nature or another. [*Chesapeake Bay Bridge & Tunnel Dist. v. Lauritzen,* 404 F.2d 1001 (4th Cir. 1968)].

Likewise, waiver has been found where the state has failed to timely plead its immunity privilege. *Clark v. Barnard,* 108 U.S. 436 (1883). Or a more limited waiver may be found. In the instant cause, the Petitioner filed its Answer in the District Court without asserting sovereign immunity. To be sure, a subsequent Motion to Dismiss raised Eleventh Amendment defenses. Without a hearing, without stated rationale and prior to discovery, the District Court dismissed the action even in light of the fact that sovereign immunity can be waived by a failure to timely plead it. *Clark v. Barnard,* 108 U.S. 436 (1883). Upon remand, it may well be determined that no waiver occurred merely by appearance without assertion of the Eleventh Amendment bar. *See McDonald v. State of Illinois,* 557 F.2d 696 (7th Cir. 1977) cert. denied 434 U.S. 966 (1978). Nonetheless, this factual determination initially should best be left to the District Court.

III.

ALTERNATIVE GROUNDS FOR HOLDING BELOW

(A) Direct Cause of Action Under the Fourteenth Amendment.

As alleged in their Original Complaint, filed in the District Court, and as briefed on appeal,[4] the Respondents assert a direct cause of action under the Fourteenth

4. Brief of Appellant to the Fifth Circuit Court of Appeals at pp. 9-10.

Amendment to the United States Constitution. This issue was not reached either by the District or the Circuit Court.

Certainly the cases emanating from this Court lend credence to the proposition that such an action would allow the inclusion of a state agency as a party defendant. *See gen., Carlson v. Green,* ____U.S.____, 100 S.Ct. 1468 (1980); *Davis v. Passman,* ____U.S.____, 99 S.Ct. 2264 (1979); *City of Kenosha v. Bruno,* 412 U.S. 507 (1973); *Bevins v. Six Federal Narcotics Agents,* 403 U.S. 388 (1971); *Bell v. Hood,* 327 U.S. 678 (1946); *and Wiley v. Sinkler,* 179 U.S. 53 (1900). While none of these cases specifically allow the involvement of a state agency as a party defendant, the rationale in *Carlson* at least suggests that where 42 U.S.C. § 1983 falls short of allowing a defendant to reach the real party at interest a direct cause under the Fourteenth Amendment will be implied.[5]

If such an action can indeed be implied then no serious question exists that sovereign immunity would not preclude prospective relief. *Edelman,* 415 U.S. at 664; and *Milliken v. Bradley,* 433 U.S. 267, 289 (1977). Consequently, this Court should not now entertain a challenge

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5. Such a bifurcation would not be without its own internal logic. An important distinction between § 1983 and an implied Constitutional cause of action is that the former is far more inclusive in its reach, embracing as it does both Constitutional and statutory claims. *Maine v. Thiboutot,* ____U.S.____, 100 S.Ct. 2502 (1980). Congress may well have been reluctant to allow a suit directly against the State, in its own name, where statutory construction (with only tenuous relations to the Constitutional structure of the Fourteenth Amendment) forms the basis for the harm alleged. Conversely, violations of the core values of that Amendment are most likely to require direct sanctions upon the State.

to the District Court's ability to fashion appropriate equitable relief.[6]

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6. Damages against the State may also be available. Where Constitutional claims are asserted which involve violations of civil liberties the Fourteenth Amendment may abrogate *pro tanto* the Eleventh Amendment defense. That is, the Fourteenth Amendment, by its essential nature may be inconsistent with the existence of sovereign immunity and the states, by ratifying the Amendment may have waived their general right not to be sued by private citizens. The Amendment's passage resulted in a basic alteration of "our Federal System wrought in the reconstruction era and worked a vast transformation from the concepts of federalism that had prevailed in the late Eighteenth Century." *Mitchum v. Foster*, 407 U.S. 225, 238 (1971); *and Swickler v. Koota*, 389 U.S. 241 (1967). *See also* B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction*, 292-319 (Negro University Press 2d ed. 1969 N.Y.). It created circumstances in which state immunity has no place, by stripping the states of their hitherto existing sovereign power to deny equal protection or due process of law. The case law has recognized the enormous impact of the reconstruction amendments on sovereign immunity. *See Ex Parte Virginia*, 100 U.S. 339 (1880); *Prout v. Starr*, 188 U.S. 537 (1903); *General Oil Company v. Crain*, 209 U.S. 211 (1908). Moreover, this Court has illuminated the powers of Congress vis-a-vis the states at least where Congress acts pursuant to the Fourteenth Amendment:

> [W]e think that the Eleventh Amendment, and the principles of state sovereignty which it embodies [citation omitted] are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that Section Congress is expressly granted authority to enforce 'by appropriate legislation' the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the Constitutional grant, it is exercising that authority under one section of a Constitutional Amendment whose other sections by their own terms embody limitations on state authority.

Fitzpatrick v. Bitzer, supra at 456. Uncertainty still fogs perception of precisely what limitations are embodied within the Fourteenth Amendment absent congressional action. *Cf. City of Mobile, Ala. v. Bolden*, ____U.S.____, 100 S.Ct. 1490, 1504 (1980). But, if we suppose that First Amendment values are implicit in Section One we must then also determine that state immunity is precluded.

> The Fourteenth Amendment, like its companions the Thirteenth [*Jones v. Aldred H. Meyer Co.*, 392 U.S. 409 (1963)] and Fifteenth

In this context, with a potentially dispositive cause of action not reached by the courts below and not brought forward here,[7] *Carlson* dictates caution. *See Carlson*, 100 S.Ct. at 1471 n.6.

This issue is not squarely presented nor has it been briefed by Petitioner[8] and thus the interests of judicial

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[*South Carolina v. Katzenback*, 383 U.S. 301, 325 (1965)], is self-executing and self-enforcing. As early as 1883, the Supreme Court noted that:

> The first section of the Fourteenth Amendment . . . is prohibitory in its character, and prohibitory upon the States . . . It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property, without due process of law, or which denies to any of them the equal protection of the laws.

The Civil Rights Cases, 109 U.S. 3, 10-11 (1883). *See also Oliver v. Donavan*, 293 F.Supp. 958 (S.D. N.Y. 1968). Section Five of the Fourteenth Amendment, potent though it may be:

> [D]oes not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under Section Five is limited to adopting measures to enforce the guarantees of the Amendment; Section Five grants no power to restrict, abrogate, or dilute these guarantees.

Katzenback v. Morgan, 384 U.S. 641, 651 n.10 (1966). Thus, it appears that (whatever powers Congress may possess to expand the areas of concern protected by the Fourteenth Amendment) the mere fact that the Amendment itself protects certain core values restricts the State's immunity by the very words of Section One itself. In that light, damages which historically have been regarded as the ordinary remedy for invasions of personal interests in liberty are appropriate here. *Cf. Davis v. Passman, supra* 99 S.Ct. at 2276-77.

7. This issue was not addressed by the Circuit Court in light of its holding that Texas A&M University is a "person" within the parameters of 42 U.S.C. § 1983. *Gay Student Services*, 612 F.2d at 166. Thus, the matter would remain viable on remand should this Court hold that the University is not such a "person".

8. *See* Brief of Appellee to the Fifth Circuit Court of Appeals at p. 1.

administration will not best be served by addressing it herein, at least until after remand has solidified the facts and the legal issues.

As this Court stated in *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 278 (1977):

> The question of whether . . . we should by analogy to our decision in *Bivens* . . . imply a cause of action directly from the Fourteenth Amendment . . . is one which . . . should not be decided on this record.

(B) The State is the Real Party at Interest for Purposes of Attorneys' Fees.

To further complicate the factual array presented by this cause, 42 U.S.C. § 1988, recently amended by the Civil Rights Attorneys' Fees Awards Act of 1976, is an available remedial statute to which the Respondent is entitled to resort. *Hutto v. Finney,* ____U.S.____, 98 S.Ct. 2565 (1978). Congress made plain that the real party at interest when such fees are asserted against the state is the state itself.

> [D]efendants in these cases are often state or local bodies or state or local officials. In such cases it is intended that the attorneys' fees [awardable under 42 U.S.C. § 1988], like other items of cost [footnote omitted], will be collected either directly from the official, in his official capacity [footnote omitted], from funds of his agency or under his control or from the state or local government (whether or not the agency or government is a named party).

Leg. History, *The Civil Rights Attorneys' Fee Award Act of 1976,* 1976 U.S. Code Cong. And Admin. News 5908, 5913. Admittedly, prior to the inclusion of the attorneys' fees provision, 42 U.S.C. § 1988 had generally been construed not to create a substantive cause of action. *Moor v. County of Almeda,* 411 U.S. 693 (1973). Nonetheless, the impact of the statute upon the state's Eleventh Amendment immunity is substantial. *See Hutto,* 98 S.Ct. at 2578 n.31. The resolution of the knotty question whether the state may be named as a defendant solely for the purposes of 42 U.S.C. § 1988[9] should, like the other open questions alluded to above, await a factfinding determining the status of Texas A&M University vis-a-vis the State of Texas.

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9. *N.Y. Gaslight Club, Inc. v. Carey,* ____U.S.____, 100 S.Ct. 2024 (1980) makes this issue even more imposing. There this Court, in the context of the closely related fee award provisions of 42 U.S.C. § 2000e-5(k), held that:

> [W]e must conclude that [the statute's] authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney's fees for legal work done in state and local proceedings [footnote omitted].

N.Y. Gaslight Club, Inc., supra, 100 S.Ct. at 2032. Thus, it is at least arguable that this independent cause of action, meant literally to include the State (*See* 1976 U.S. Code Cong. And Admin. News, *supra* at 5913, cited above) would support such an action in the name of the state itself.

CONCLUSION

For each of these reasons Respondents suggest that resolution of the complex issues involved is premature. Consequently, petition for a writ of certiorari should be denied thereby muscularizing the remand of the Circuit Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Respondents' Brief in Opposition have been furnished to Ms. Ann Kraatz, Assistant Attorney General, Supreme Court Building, P. O. Box 12548, Capitol Station, Austin, Texas 78711, by certified mail, return receipt requested, on this the 13th day of October, 1980.

ORIGINAL SIGNED BY
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APPENDIX

THE 11th AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

THE 14th AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws.

* * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983. *Civil Action for Deprivation of Rights*

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1988. *Proceedings in Vindication of Civil Rights.*

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX

of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 2000e-5. *Attorney's Fee; liability of Commission and United States for Costs*

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.